United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 749

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, APPELLANT,

vs.

RICHARD F. COOPER and BARBARA V. COOPER, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WYOMING.

FILED SEPTEMBER 21, 1932.

INDEX.

	Original	Print
Petition, filed Jan. 15, 1931	1	1
Answer, filed March 30, 1931	7	6
Stipulation waiving a jury, filed May 11, 1931	10	8
Judge's memorandum, filed April 7, 1932	11	8
Judgment, filed May 13, 1932	16	13
Petition for appeal, filed Aug. 8, 1932	18	15
Assignment of errors, filed Aug. 8, 1932	20	16
Order allowing appeal, filed Aug. 8, 1932	22	17
Citation, filed Aug. 11, 1932	23	18
Bill of exceptions, filed Sept. 2, 1932	25	18
Stipulation of facts	25	18
Exhibit A—Last will and testament of Arthur Francis Thomas Cooper	29	21
Exhibit B—Agreement between Frank Cooper and Frank O. Harrison, as Trustee, parties of the first part, and The Ohio Oil Co., party of the second part	35	30

	Original	Print
Plaintiff's motion for judgment	38	35
Defendant's motion for judgment	38	36
Order—Trial to court and case taken under advisement	39	36
Orders allowing time to submit judgment	40	37
Judgment	41	38
Motion for extension of time within which to prepare and file bill of exceptions, with order thereon	43	39
Motion for order nunc pro tunc overruling defendant's motion for judgment and sustaining plaintiff's motion for judgment, with order thereon	45	42
Stipulation of counsel re approval of bill of exceptions	48	43
Order of court approving and settling bill of exceptions	49	44
Election as to printing, filed Sept. 13, 1932	50	45
Stipulation for transcript, filed Sept. 13, 1932	51	45
Praecipe for transcript, filed Sept. 13, 1932	53	47
Clerk's certificate	54	48

	Page
Proceedings in U.S.C.C.A., Tenth Circuit	48-A
Caption	48-A
Appearances	49
Order of submission	49
Opinion, McDermott, J.	50
Judgment	55
Motion to stay mandate	55
Order staying mandate	56
Motion to further stay mandate	56
Order further staying mandate	56
Clerk's certificate	57
Order allowing certiorari	59

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF WYOMING.

Pleas and Proceedings before The Honorable T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming, presiding in the following-entitled cause:

RICHARD F. COOPER and BARBARA V. COOPER,

Plaintiffs,

Law vs. No. 2064

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant.

Be it remembered, that heretofore, and on, to-wit,
1 the 15th day of January, A. D. 1931, came Richard F. Cooper and Barbara V. Cooper, plaintiffs, by Corthell, McCullough and Corthell, their attorneys, and filed in said Court a petition against Marshall S. Reynolds, Individually and as Collector of Internal Revenue.

The said petition is in words and figures, as follows, to-wit:

Petition.

The plaintiffs allege the following facts for their
2 cause of action against the defendant:

1. Heretofore, to-wit, on the 14th day of March, 1924, the said Richard F. Cooper, as administrator of the estate of John Hartshorn Cooper, deceased, made and filed with the Collector of Internal Revenue for the District of Wyoming the return of taxable income for said estate for the period from January 1st to September 12th, 1923, inclusive. The lawful tax upon said return was $660.27, which amount was paid by said administrator to the defendant in full.

2. In said return the administrator included the sum of $8,858.73 as income from fiduciaries, being the distributive share accruing to and received as income by said estate from C. B. Collinson, E. P. Lewis and R. F. Cooper, as trustees, under the will of A. F. T. Cooper, deceased.

3. The right and interest of said estate with respect to which the said distributive share accrued to said estate was derived under the following provisions of said will and the codicil thereto, to-wit:

(Extract from original Will of A. F. T. Cooper:)

"14. I give, devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell, call in, collect and convert into money the said
3 real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession, unless it shall appear to my trustees that an earlier sale shall be beneficial), and so that they shall have the fullest power and discretion to postpone the sale, calling in, and conversion of the whole or any part or parts of the said premises during such period as they shall think proper, and to retain the same or any part thereof in its present form of investment without being responsible for loss, and shall out of the moneys to arise from such calling in or conversion, pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed by this will or any codicil hereto, and make provision for the duty on any legacies or annuities bequeathed free of duty, and shall hold the residue of such moneys after payment of legacy duty thereon—"

(Extract from Codicil of provision superseding residue of said paragraph 14 of original Will:)

"Upon trust as to the first twenty one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper, the sum of seven

thousand pounds to my son John Hartshorn Cooper, and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate, and as to the residue (if any) thereof, upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely, and as to one-fourth part or share for my said son John Hartshorn Cooper absolutely, and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper, but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. The lease provided for royalty payments to the lessor beginning at 12½% in 1917 and increasing to 20% in 1927 and thereafter. The lease was for twenty years, with privilege of an extension for a further period of twenty years. Under the lease the Ohio Company discovered and developed profitable production of oil and gas. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustees had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during the entire year 1923 the residuary clause of the said codicil was operative; and the trustees distributed the receipts of the taxable period (January 1st—September 12th, 1923), consisting of royalties
4 under the said lease and interest on funds in their hands, in the proportions of one-half to the said Richard F. Cooper, one-fourth to said estate of John Hartshorn Cooper and one-fourth to Barbara V. Cooper, or to her use.

5. The said trustees in March, 1924, made and filed with the Collector of Internal Revenue a fiduciary information return, only. The income shown on said return consisted of $908.08 derived from interest on funds in the hands of the

trustees, and gross receipts of $87,240.39 accruing in 1923 from oil and gas royalties under the said lease, from which were deducted depletion amounting to $43,608.67 and taxes and expenses amounting to $7,891.55, leaving as income, of the amount accruing, as aforesaid, from royalties, $35,740.17, which, together with the amount accruing, as aforesaid, from interest, aggregated net income of $36,648.25, from which the said amount of $8,857.73 returned by said administrator as income of said estate from said fiduciaries was derived.

6. Thereafter, to-wit, on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said estate an additional income tax for the said taxable period (January 1st—September 12th, 1923) in the sum of $420.39. Such determination and assessment was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the net income shown by the said administrator's return of the sum of $4,913.60, representing such proportion of the deductions for depletion on the fiduciary return as was applicable to the distributive share of said estate aforesaid. Such disallowance of depletion and addition to income were made under the asserted claim of the Commissioner that the said estate, as a beneficiary of the trust, was not entitled to the benefit of any deduction for depletion, although in truth and in fact, as determined by said Commissioner, under the law and regulations applicable thereto, depletion of the capital value of the said oil and gas interests, to the full extent so claimed, actually accrued and was sustained by the removal of oil and gas therefrom in 1923.

7. Thereafter, to-wit, on the 29th day of December,
5 1928, the defendant demanded payment by said estate, and by the plaintiffs herein, as distributees of said estate, of such additional tax, together with interest thereon amounting to $110.36, making a total of $530.75, and threatened to enforce such payment by distress upon the property of said estate and of the plaintiffs, whereupon, under compulsion and protest and involuntarily to prevent such distress, the plaintiffs, on December 29th, 1928, paid to the defendant the said sum of $530.75.

8. The plaintiffs allege that the disallowance of said de-

duction for depletion was unauthorized and unlawful; that the said estate and the plaintiffs were entitled to claim and take the benefit of the same in determining the net income of said estate; that the additional tax determined and assessed against the said estate, based on the disallowance of such deduction, was unauthorized and unlawful. The plaintiffs, therefore, allege that on, to-wit, the 29th day of December, 1928, the defendant, in manner aforesaid, became and was indebted to the plaintiffs for money then had and received by the defendant from the plaintiffs, to the use of the plaintiffs, in the said sum of $530.75, which said sum was then and there due and payable from the defendant to the plaintiffs; and that no part of such indebtedness has been paid.

9. Thereafter, to-wit, on September 14th, 1929, the plaintiffs made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $530.75, with interest thereon, upon the grounds aforesaid, and demanded payment thereof. More than six months has elapsed since the said application was made and filed, as aforesaid.

Wherefore, the plaintiffs pray judgment against the defendant for the recovery of the said sum of $530.75, with interest thereon from December 29, 1928, at the rate of seven (7%) per cent per annum, and for costs, and all other proper relief.

CORTHELL, McCOLLOUGH & CORTHELL,
Plaintiff's Attorneys.

State of Wyoming, County of Albany—ss.

I, N. E. Corthell, being first duly sworn, say I am
6 one of the attorneys for the plaintiffs in the above entitled action. I have read the foregoing petition and know the contents thereof and I believe the facts therein stated to be true.

N. E. CORTHELL.

Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1931. (Seal) H. A. Baumbach, Notary Public.

Answer.

Filed March 30, 1931.

Now comes Marshall S, Reynolds, the defendant,
7 by Albert D. Walton, United States Attorney for the District of Wyoming, and files this his answer to the petition heretofore filed by the plaintiff.

1. Defendant denies the allegation in paragraph 1 of plaintiffs' petition, and on the contrary defendant alleges that on the 15th day of March, 1924, a federal income tax return for the Estate of John Hartshorn Cooper, for the period from January 1 to September 12, 1923, inclusive, was made and filed with the Collector of Internal Revenue for the District of Wyoming, by N. E. Corthell; that said return disclosed a tax of $670.06; that on May 12, 1924, a further return was filed by the said N. E. Corthell, for the Estate of John Hartshorn Cooper for the period from January 1st to September 12, 1923, inclusive, which return disclosed a tax of $660.27.

2. Defendant admits the allegations in paragraph 2 of the plaintiffs' petition that in said return the administrator included the sum of $8,858.73 as income from fiduciaries. All other allegations in said paragraph defendant denies.

3. Defendant is without knowledge as to the facts set forth in paragraph 3 of the petition and demands strict proof of each and every allegation thereof.

4. Defendant is without knowledge as to the facts set forth in paragraph 4 of the petition and demands strict
8 proof of each and every allegation thereof.

5. Defendant admits the allegations in paragraph 5 of the petition.

6. Defendant admits the allegations in paragraph 6 of the petition that on October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said estate an additional income tax for the said taxable period (January 1, to September 12, 1923) in the sum of $420.39; and that such determination was based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return for depletion of the oil and gas properties from which the royalties aforesaid were derived, and the addition to the

net income shown by the administrator return of the sum of $4,913.60. Defendant, however, denies each and every other allegation contained in said paragraph 6 of the petition.

7. Defendant admits that the defendant demanded payment by said estate and by the plaintiffs herein, as distributees of said estate of such additional tax, with interest in the sum of $110.36, making a total of $530.75, and that the plaintiffs on December 29, 1928, paid to the defendant the said sum of $530.75. Defendant, however, denies all other allegations contained in said paragraph 7 of the petition.

8. Defendant denies the allegations in paragraph 8 of the petition.

9. Defendant admits the allegations in paragraph 9 of the petition.

Wherefore defendant demands judgment that the petition be dismissed and for costs herein.

ALBERT D. WALTON,
United States Attorney,
Attorney for Defendant.

United States of America, District of Wyoming—ss.

Albert D. Walton, being of lawful age, and being
9 first duly sworn according to law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above-entitled cause; that he has read the above and foregoing answer and knows the contents thereof, and that all of the facts therein stated and allegations therein contained are true, as he verily believes.

ALBERT D. WALTON.

Subscribed in my presence and sworn to before me this 30th day of March, A. D. 1931. Capitola G. Allison, Deputy Clerk, U. S. District Court for the District of Wyoming.

Stipulation of Waiving of Trial by Jury.

Filed May 11, 1931.

It is hereby stipulated by and between the parties
10 to the above entitled cause and their respective attorneys that the said cause may be tried to the Court without the intervention of the jury, trial by jury being hereby expressly waived.

Dated this 11th day of May, 1931.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

Attorney for Defendant.

Richard F. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2062, Civil-Law.

Barbara V. Cooper, Plaintiff, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2063, Civil-Law.

Richard F. and Barbara V. Cooper, Plaintiffs, v. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, No. 2064, Civil-Law.

Filed April 7, 1932.

Corthell, McCullough & Corthell of Laramie, Wyo.,
11 for Plaintiffs.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., John R. Wheeler, Special Attorney, C. M. Charest, General Counsel, and Percia E. Miller, Special Attorney, all of the Bureau of Internal Revenue, of Washington, D. C., for Defendant.

Judge's Memorandum.

Decided April 7, 1932.

KENNEDY, District Judge.

These are cases in which the plaintiffs are seeking to recover

income taxes assessed by the Commissioner in the nature of deficiencies and paid under protest, appropriate demands having been subsequently made to refund the same and refused. After issues were joined, the causes were tried and submitted together upon a stipulation of facts, jury
12 being waived. Trial briefs have been filed.

The matter raises a rather controversial point of law which will undoubtedly invite a review by an appellate court, so that an extended rehearsal of the facts by this court would seem unnecessary in the light of their being stipulated. Suffice it to say, that the question presented for determination is, as to whether or not the plaintiffs as beneficiaries under a trust created by the will of one Arthur Francis Thomas Cooper are entitled to an allowance for a depletion as applied to their proportionate shares of funds accruing from oil royalties collected by said trust and distributed to them as such beneficiaries. Such depletion was claimed by plaintiffs for various years, extending from the year 1923 to the year 1928, and under the stipulation as I view it, the amounts sought to be recovered by the plaintiffs are the identical amounts paid as taxes by said plaintiffs under protest, representing the deductions for depletion, the computation of such depletion not being in dispute. Except as there may be possible corrections to be made on account of tax computations, the same general principle underlies the determination of the question as a matter of law in each case and therefore this memorandum will not discuss details.

The various income tax statutes under which the Commissioner purported to assess the tax for the several years are substantially the same as applied to the point under consideration.

The will, so far as its pertinent portions are here concerned, provides as follows:

> "14. I give devise and bequeath all of the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees Upon trust that my trustees shall sell call in collect and convert into money the said real

and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to
13 arise from such calling in or conversion pay my funeral and testamentary expense and my debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof Upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof. Upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) Upon the trusts declared concerning the first sixty thousand pounds."

"15. I hereby declare that my trustees shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same Upon trust to invest the same in any of the securities authorized by this my will with full power to sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death Upon trust for all or such one or more exclusively of the

others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages of times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment Upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain the age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

"16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the direction of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not per capita Provided that any share appointed to any child of mine or my said daughter or his or her issue under

the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the un-appointed part of the said trust premises.

"17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

"18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees Upon trust for the survivor of them absolutely."

As I view the situation here presented, the determining factor in the matter of the validity of the tax, is as to whether the plaintiffs as beneficiaries under said trust have or have not an interest in the corpus covered by the trust. If they have such an interest the depletion is properly deductible and the tax is improperly assessed; while on the contrary, if they have no interest in such corpus, the depletion charged is not deductible and the taxes are proper.

That the disagreement arises over oil royalties of which the testator was possessed and the proceeds from which have subsequently come into the trust, is not in dispute. The income tax figures were arrived at by the fiduciary deducting

from the royalties the properly computed depletion which in turn was claimed in proportionate amounts by the beneficiaries in the computation of their income.

The provisions of the will concerning the trust features, construed as free from legal technicality, amount to the mere passing of the income accruing from the royalties through the trust to the beneficiaries and therefore in substance, the situation is the same as though the beneficiaries were receiving such royalties direct, in which latter situation there could be no doubt that the beneficiaries would be entitled to a deduction by way of appropriate depletion in connection with this class of property. To hold otherwise would mean in substance that such beneficiaries were paying a tax on property, which is not within the contemplation nor is it permissible under the provisions of the Sixteenth Amendment and the statutes enacted thereunder.

Further elaboration of the views of this Court concerning the rule of law to be applied to the trust under consideration would serve no useful purpose. I am unable to distinguish on principle this case from the case of Merle-Smith v. Commissioner, 42 Fed. (2d) 837, in which case certiorari was denied by the Supreme Court. 282 U. S. 897. Depletion was there allowed the beneficiaries.

It should be remembered that tax statutes in case of doubt are most strongly construed against the Government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179; Burnet v. Niagara Falls B. Co., 282 U. S. 648; and that in applying the provisions of the income tax laws matters of form should be disregarded for those of substance. United States v. Phellis, 257 U. S. 156.

Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinbefore stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.

Richard F. Cooper, and Barbara V. Cooper, Plaintiffs, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant. No. 2064 Civil.

Judgment.

Filed May 13, 1932.

This cause having heretofore come on to be heard
16 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiffs having appeared by N. E. Corthell, their attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Atttorney for the District of Wyoming, his attorneys; and the Court having taken the case under advisement, and having considered the stipulation of facts and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiffs, Richard F. Cooper and Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the cause of action set forth in the petition for the sum of Five Hundred Thirty and 75/100 Dollars ($530.75) with interest at the rate of 6% per annum from December 29, 1928.

It is therefore considered and adjudged by the Court that the plaintiffs Richard F. Cooper and Barbara V. Cooper do have and recover from the defendant, Marshall S. Reynolds,
Individually and as Collector of Internal Revenue, the
17 said sum of Five Hundred Thirty and 75/100 Dollars ($530.75), together with interest at the rate of 6% per annum from December 29, 1928, together with the costs of this action to be taxed.

To which finding and judgment the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of

the income taxes for the recovery of which this action was brought.

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Petition for Appeal.

Filed Aug. 8, 1932.

The above-named defendant, Marshall S. Reynolds,
18 Individually and as Collector of Internal Revenue, petitioner herein, feeling himself aggrieved by the order and judgment entered in the above-entitled cause on the 13th day of May, A. D. 1932, in favor of the plaintiffs in the above-entitled action and against the defendant herein, wherein and whereby it was ordered and adjudged that plaintiffs have judgment against the defendant, does hereby appeal from said order and judgment entered on the 13th day of May, A. D. 1932, and from the whole thereof to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons and upon the grounds specified in his assignment of errors filed herein, and defendant prays that this, his petition for appeal, and his said appeal may be granted and allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said order and judgment was made and entered, duly authenticated may *be* sent to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 8th day of August, A. D. 1932.

MARSHALL S. REYNOLDS,
Individually and as Collector of Internal Revenue, Defendant.

By ALBERT D. WALTON,
19 United States Attorney for the District of Wyoming.

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Assignment of Errors.

Filed Aug. 8, 1932.

Marshall S. Reynolds, Individually and as Collector
20 of Internal Revenue, defendant in the above-entitled cause, by Albert D. Walton, United States Attorney for the District of Wyoming, Ewing T. Kerr, Assistant United States Attorney for the District of Wyoming, and John R. Wheeler, Special Attorney for the Bureau of Internal Revenue, his attorneys, having filed petition for appeal, as provided by law, that defendant appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the final order and judgment made and entered in said cause on May 13, 1932, in favor of the plaintiff and against the defendant herein, now makes and files in support of said appeal the following assignment of errors upon which it will rely for reversal of said final order and judgment upon the said appeal, which said errors, and each and every one of them, are to the great detriment, injury and prejudice of this defendant, and defendant says that in the records and the proceedings on the hearing and determination of this cause in the District Court of the United States for the District of Wyoming there are manifest errors in this, to-wit:

I.

The Court erred in holding that the sum of $4,913.60
21 claimed by plaintiffs as deduction for depletion was not income to plaintiffs for the period from January 1st to September 12th, 1923 inclusive.

II.

The Court erred in holding that the sum of $420.39 assessed as additional income of plaintiffs for the period January 1st to September 12th, 1923, and which together with interest in the sum of $110.36, was collected from plaintiffs, was illegally assessed and illegally collected.

III.

The Court erred in overruling defendant's motion for judgment in favor of defendant.

IV.

The Court erred in allowing and granting plaintiffs' mo-

tion for judgment in favor of plaintiffs, and against the defendant.

V.

The Court erred in making and entering judgment in favor of the plaintiffs and against the defendant.

Therefore, defendant prays that the said order and judgment entered herein, as aforesaid, in favor of the plaintiffs and against the defendant, be set aside, annulled, reversed and held for naught, and that said cause be remanded to the District Court for further proceedings in the premises, and for such other and further relief to which the defendant may be entitled.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order Allowing Appeal.

Filed Aug. 8, 1932.

The above-entitled cause coming on regularly to be
22 heard upon the petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the above-named defendant, praying that an appeal be allowed herein from the order and judgment made and entered herein on May 13, A. D. 1932, and for the reversal of said order and judgment, and said petitioner having filed herein and presented to this Court his said petition for appeal and an assignment of errors relied on and intended to be urged by him upon said appeal, and it appearing to the Court that petitioner is entitled to said appeal:

Now, therefore, on motion of Ewing T. Kerr, Esquire, Assistant United States Attorney for the District of Wyom-

ing, of counsel for the petitioner, it is ordered that the said petition of Marshall S. Reynolds, Individually and as Collector of Internal Revenue, defendant above named, for appeal from said order and judgment made and entered on May 13, A. D. 1932, be, and the same hereby is, granted, and the said appeal be, and the same hereby is, allowed without the filing of an appeal bond by or on behalf of said defendant.

Dated this 8th day of August, A. D. 1932.

T. BLAKE KENNEDY, Judge.

[Citation in proper form, directed to appellees, with acceptance of service by counsel for said appellees, was filed in the District Court on Aug. 11, 1932.]

BILL OF EXCEPTIONS.

Filed Sept. 2, 1932.

Be it remembered that on the 7th day of January,
25 A. D. 1932, at ten o'clock A. M. of said day, the above entitled cause came on for trial before the Court without the intervention of a jury, a trial by jury having been waived in writing, the Honorable N. E. Corthell appearing as attorney for plaintiffs, and Albert D. Walton, United States Attorney for the District of Wyoming, and the Honorable John R. Wheeler, Special Attorney, Bureau of Internal Revenue, appearing on behalf of defendant.

After opening statements by counsel the following proceedings were had:

A stipulation of facts having been filed in this cause was offered and received in evidence and is as follows:

Stipulation of Facts.

It is hereby stipulated and agreed by and between
26 the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

1. On March 15, 1924, a federal income tax return for the Estate of John Hartshorn Cooper, deceased, for the period from January 1st to September 12, 1923, inclusive, was made and filed with the Collector of Internal Revenue by N. E. Corthell, as agent, and thereafter on May 12, 1924, an amended return for the said period was filed by N. E. Corthell, as agent, for the Estate of John Hartshorn Cooper, deceased. The income tax of $660.27 shown on said amended return was paid in full.

2. In said return there was included the sum of $8,858.73, as income from fiduciaries claimed by the plaintiff to represent the distributive share of said estate of the income from the trust established under the will of A. F. T. Cooper, deceased.

3. The right and interest of said estate with respect to which its distributive share accrued to said estate was derived under the will and codicil thereto of said A. F. T. Cooper, a copy of which is hereto attached and marked Exhibit A, and by reference made a part hereof as though fully set out at this point.

4. Said A. F. T. Cooper in his lifetime, to-wit, on October 9, 1917, had leased to the Ohio Oil Company certain oil and gas interests owned by him in Wyoming. A copy of said lease is attached hereto and marked Exhibit B and by reference hereto is made a part hereof. On December 8, 1918, A. F. T. Cooper died. Prior to 1923 the trustee had discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had
27 discharged the funeral and testamentary expenses and the debts, legacies and annuities bequeathed by said will, and had discharged the directions of the codicil as to "the first twenty-one thousand pounds" therein mentioned, so that during 1923 and subsequent years the residuary clause of the said codicil was operative; and the trustees distributed the receipts of 1923 and subsequent years, consisting of royalties under the said lease and interest on funds in their hands, in the manner following, to-wit: The receipts accruing prior to September 13, 1923, when said estate was settled and distributed, in the proportion of one-half to Richard F. Cooper, one-fourth to the said Estate of John

Hartshorn Cooper and one-fourth to Barbara V. Cooper or to her use.

5. For the taxable year 1923, the trustees made and filed with the Collector of Internal Revenue a fiduciary information return. The return so filed showed gross income of $88,148.47, consisting of interest on funds in the hands of the trustees and gross receipts from oil and gas royalties under said lease. From the aggregate gross income the trustees in said return, deducted taxes and expenses paid amounting to $7,891.55 and they also deducted depletion in the sum of $43,608.67, resulting in a net income of $36,648.25, from which amount of the net income the shares of the Estate of John Hartshorn Cooper, deceased, as stated in the fiduciary return, was derived. The amount of said income of said estate was stated by the fiduciary to be $8,857.73.

6. On October 12, 1928, the Commissioner of Internal Revenue determined and assessed against said Estate of J. H. Cooper an additional income tax for the said taxable period, January 1—September 12, 1923, in the sum of $420.39. Such determination and assessment were based wholly on the disallowance by the Commissioner of the deduction claimed in the fiduciary return of the trustees for depletion of the oil and gas properties from which the royalties aforesaid were derived and the addition to the net income shown by the administrator's return for said estate of the sum of $4,913.60.

7. If the contention of the plaintiffs that depletion
28 is lawfully allowable to the plaintiffs is determined by the Court in their favor, then the deduction to be allowed from gross income of the plaintiffs on account of depletion for the year 1923 is the amount which has been claimed in the Federal income tax return filed for that year and which is as follows:

1923	$4,913.60

It is, however, agreed that the defendant objects to the materiality, competency or relevancy of the above amount of depletion inasmuch as the defendant contends that under the provisions of the will of A. F. T. Cooper, as properly construed, the plaintiffs have no present property interest in the

corpus which would warrant the right to a depletion deduction, or serve as a basis for a depletion deduction.

8. On December 29, 1928, the defendant demanded payment by said estate and by the plaintiffs herein as distributees of said estate of such additional tax of $420.39, together with interest thereon amounting to $110.36, making total of $530.75; whereupon under compulsion and protest the plaintiffs, on December 29, 1928, paid to the defendant the said sum of $530.75.

9. On September 14, 1929, the plaintiffs made and filed with the defendant and the Commissioner of Internal Revenue an application to refund the said sum of $530.75, with interest thereon, upon the grounds aforesaid and demanded payment thereof. More than six months elapsed after the said application was made and filed prior to the commencement of this action.

N. E. CORTHELL,
Attorney for Plaintiffs.

ALBERT D. WALTON,
United States Attorney,

JNO. R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Exhibit A.

This is the last Will and Testament of me Arthur
29 Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby, England.

1. I hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last will and testament.

2. I appoint my son Richard Francis Cooper and my brother in law the Reverend Christopher Barber Collinson and Edgar Percy Lewis of No. 32 Queen Victoria Street in the city of London Solicitor to be the executors and trustees of this my will and they and the survivor of them and the executors and administrators of such survivor his and

their assigns or other the trustees or trustee for the time being of this my will are hereinafter referred to as "my trustees".

3. I give to the said Reverend Christopher Barber Collinson a legacy of five hundred pounds free of legacy duty and to the said Edgar Percy Lewis a legacy of two hundred pounds free of legacy duty if they shall prove this my will and any codicil or codicils I may make thereto and act in the trusts thereof.

4. I bequeath the use and enjoyment of all articles of personal or domestic or household or stable or garden use or ornament belonging to me to my wife Jane Mary Evelyn Cooper during her life she keeping the same properly insured against loss or damage by fire and after her death but subject to the exercise of the power of gift hereinafter given to my said wife I bequeath the same to my said son Richard Francis Cooper. And I declare that it shall not be necessary for my trustees to take any inventory of the articles bequeathed by this clause and that my trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatever. And I expressly declare that my said wife shall have full liberty during her lifetime to give any or all of my big game or other trophies to my son Richard Francis Cooper and to him and either of my other children any of the articles (other than the said big game and other trophies) bequeathed to her for life by this clause.

5. I give devise and bequeath subject to my wife's life interest therein the ten thousand pounds or other the investments for the time being representing the husband's fund of the settlement made on my marriage with my present wife in one thousand eight hundred and ninety-nine equally to and amongst my three children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts hereinafter declared in clause 15 hereof.

6. I give to my daughter Barbara Violet Cooper the sum of five thousand pounds free of legacy duty to be paid in priority to all legacies bequeathed by this my will and to be held by my trustees upon the trusts hereinafter declared concerning the same in clause 15 hereof.

7. I give to my old and faithful servant Philip Austin a legacy of one hundred pounds free of legacy duty.

8. I bequeath to the said Philip Austin, an annuity of one pound a week and to my old servant Jessie Oliver an annuity of ten shillings a week. Both annuities are to be free from death duties and are to commence from the day of my death and to be payable weekly and the first payments thereof are to be made as soon as my trustees can conveniently make the same immediately after my death.

9. Provided always and I declare that if any act or event shall happen in my lifetime or after my death whereby the said annuities or either of them would if belonging absolutely to the said Philip Austin or the said Jessie Oliver respectively become vested in or charged in favour of some other person or persons or a corporation then such annuity shall cease as if he or she were dead. Provided always and I declare that my trustees shall not be liable or responsible for paying the annuities hereinbefore bequeathed to the said Philip Austin and Jessie Oliver or either of them after the determination during his or her lifetime of the trust hereinbefore declared in his or her favour unless or until my trustees shall have received express notice of the event causing such failure or determination.

10. I authorize my trustees in case at any time with a view to the due administration or distribution of my estate it shall be deemed convenient so to do to appropriate and retain a sufficient part of my estate or the investments representing the same for answering by the annual income thereof any annuity hereinbefore bequeathed but without prejudice to the powers of sale and investment and transposing investments hereinafter contained and I declare that if the annual income of the appropriated fund shall at the time of appropriation be sufficient to satisfy such annuity such appropriation shall be a complete satisfaction of the trust to provide for such annuity and that if the income of the appropriated fund shall at any time and from any cause whatever prove insufficient for payment of such annuity in full resort may be had to the capital thereof from time to time to make up such deficiency and the surplus income (if any) of the said fund from time to time after the payment of the said annuity shall be applicable as income of my residuary estate.

And I declare that as and when such annuity shall cease the appropriated fund shall sink into my residuary estate.

11. I give to my trustees the sum of ten thousand pounds free of legacy duty upon trust to invest the same in any of the stocks shares and securities authorized by this my will and with power from time to time to vary such investments as they may see fit and to pay the income arising from such investments to my said wife Jane Mary Evelyn Cooper during her life for her own separate use and without power of anticipation and from and after her death upon trust as well income as capital for my two sons Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

12. Whereas I have in the events that have happened a power of appointment over the funds subject to an indenture of settlement dated the eighteenth day of June one thousand eight hundred and eighty-eight made on my marriage with my late wife Dorothy Jane Collinson now therefore I hereby appoint that the trustees for the time being of the said settlement shall stand possessed of the investments for the time being representing the fund subject to the trusts of such settlement upon trust as to one equal third share for my son Richard Francis Cooper and as to another equal third share for my son John Hartshorn Cooper and as to the remaining equal third share for my daughter Barbara Violet Cooper absolutely. Provided always and I hereby declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue then I appoint that the one-third share of the one so predeceasing me shall be held upon trust for the other of them and in the event of their both predeceasing me without leaving issue I appoint that their one-third shares shall be held upon trust for the said Barbara Violet Cooper absolutely. And I also declare and appoint that in the event of the said Barbara Violet Cooper predeceasing me without leaving issue that her one-third share shall be held upon trust for the said Richard Francis Cooper and John Hartshorn Cooper absolutely in equal shares.

13. I devise and bequeath all my freehold land messuages and premises known as the Culland Hall estate in the county of Derby unto and to the use of my trustees upon trust for my wife Jane Mary Evelyn Cooper for life and from and

after her death upon trust for my said son Richard Francis Cooper his heirs and assigns forever.

14. I give devise and bequeath all the residue of my real and personal estate and effects whatsoever and wheresoever (including as well real as personal estate over which I may have any general power of appointment or disposition by will) unto and to the use of my trustees upon trust that my trustees shall sell call in collect and convert
31 into money the said real and personal estate and premises at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale shall be beneficial) and so that they shall have the fullest power and discretion to postpone the sale calling in and conversion of the whole or any part or parts of the said premises during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss and shall out of the moneys to arise from such calling in or conversion pay my funeral and testamentary expense and debts and the legacies and annuities bequeathed by this my will or any codicil hereto and make provision for the duty on any legacies or annuities bequeathed free of duty and shall hold the residue of such moneys after payment of legacy duty thereon as to the first sixty thousand pounds thereof upon trust to pay two-third shares thereof to my son Richard Francis Cooper absolutely and the remaining one-third share thereof to my son John Hartshorn Cooper absolutely and as to the next sixty thousand pounds thereof upon trust to pay one equal third share to each of my said children Richard Francis Cooper John Hartshorn Cooper and Barbara Violet Cooper but so that the share of the said Barbara Violet Cooper shall be held upon the trusts declared by clause 15 hereof and as to the residue (if any) upon the trusts declared concerning the first sixty thousand pounds.

15. I hereby declare that my trustee shall stand possessed of the monies (except the monies appointed to her by clause 12 hereof) bequeathed by this my will to my daughter Barbara Violet Cooper or the investments for the time being representing the same upon trust to invest the same in any of the securities authorised by this my will with full power to

sell and transpose such investments and upon further trust to pay the annual income arising from such investments to my said daughter for her life but without power of anticipation and from and after her death upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of my said daughter such remoter issue to be born and take vested interests within twenty-one years after her death at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of my said daughter and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child or the issue of any deceased child of my said daughter who being males shall attain the age of twenty-one years or being females shall attain that age or marry if more than one in equal shares but so that the issue of any deceased child shall take equally between them per stirpes the share their parent would have taken had he or she survived my said daughter.

16. I hereby declare that in the event of my daughter dying without leaving any issue her surviving my trustees shall hold the said trust premises upon trust for such one or more of my children or remoter issue as shall be living at the death of my daughter at such age or time or respective ages or times if more than one in such shares and with such future and other trusts for their benefit and such provisions for their respective advancement and maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as my said daughter shall by will or codicil appoint and in default of and subject to any such appointment upon trust for such of my children and the issue of any deceased child as shall be living at the death of my daughter who being males shall attain the age of twenty-one years or being female shall marry under that age and if more than one in equal shares and so that the division shall be per stirpes and not
32 per capita. Provided that any share appointed to any

child of mine or my said daughter or his or her issue under the powers contained in this or the preceding clause shall in default of appointment to the contrary be brought into hotchpotch by such child in the division of the unappointed part of the said trust premises.

17. I declare that if any of my said children shall die in my lifetime leaving a child or children or remoter issue him or her surviving who being males or a male shall attain the age of twenty-one years or being females or a female shall attain that age or marry then and in such case such child children or remoter issue shall take the share legacy or property which his her or their parent would have taken had he or she survived me if more than one in equal shares per stirpes and not per capita.

18. I hereby declare that in the event of my daughter Barbara Violet Cooper predeceasing me leaving no issue who shall take her share legacy or property under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for my said two sons Richard Francis Cooper and John Hartshorn Cooper in equal shares and I declare that in the event of either of the said Richard Francis Cooper or John Hartshorn Cooper predeceasing me without leaving issue who shall take the share legacy or property devised and bequeathed to them under the terms of the preceding clause then I declare that such share legacy or property shall be held by my trustees upon trust for the survivor of them absolutely.

19. I declare that all estate duty on my Culland Hall estate and death duties on my foreign and colonial property (if any) and all legacy duty payable in respect of any devise legacy or annuity under this my will consequent on my death but not on the death of any life tenant or annuitant shall be paid out of my residuary estate.

20. I hereby declare that the said Edgar Percy Lewis or any trustee being a solicitor or any other person engaged in any profession or business may be employed to act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee could have done personally.

21. My trustees shall invest in their names all monies which for the time being may be subject to the trusts of this my will and requiring investment in or upon (a) The public stocks or funds or government securities of the United Kingdom or of India or of any British colony or dependency or state or of any foreign government or state (b) Freehold copyhold or chattel real securities in England Scotland or Wales (c) The bonds debentures debenture stock mortgage obligations or securities or the guaranteed or preference or ordinary or preferred ordinary or deferred ordinary stock or shares of any company incorporated or registered in or under the legislature of the United Kingdom or of India or of any British colony or dependency or state or of any foreign country or state on which there is no liability and provided that interest or dividends shall for the three years immediately preceding the date of investment have been regularly paid by any such company on its ordinary stock or shares (d) The securities of any public or municipal or local body or authority in the United Kingdom or in any British colony or dependency or state or in any foreign country or state.

22. I hereby appoint my trustees trustees for all the purposes of the Settled Land Acts 1882-1890 and section 42 of the Conveyancing Act 1881.

23. I hereby declare that all gifts legacies devises
33 and share of residue given to my said sons and daughter are in addition to any gifts made to them during my lifetime unless I have in making any such gift declared in writing to the contrary. In Witness Whereof I have to this and the five preceding sheets of paper hereunto set my hand this eighteenth day of June one thousand nine hundred and eighteen.

ARTHUR FRANCIS THOMAS COOPER.

Signed by the said Arthur Francis Thomas Cooper the testator as and for his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—J. F. Talley—C. J. Walsh—) Clerks to Messrs g f hudson matthews 7 co 32 queen victoria street London e c 4 Solrs.

This is a first codicil to the last will and testament dated the eighteenth day of June one thousand nine hundred eighteen of me Arthur Francis Thomas Cooper of Culland Hall Brailsford in the county of Derby Esquire.

1. I hereby declare that my trustees shall have full power of postponing for any length of time as in their uncontrolled discretion they may think fit the realization of the oil rights under my ranch in Wyoming U. S. A., without being liable for any loss arising therefrom and of deciding what proportion of the annual receipts therefrom shall be treated as capital and what proportion as income and their decision shall be considered for all purposes as final.

2. I hereby revoke that part of clause 14 of my said will which succeeds the words "and shall hold the residue of such moneys after payment of legacy duty thereon" and in lieu and stead thereof I declare that clause 14 shall read from and after such words as follows, viz:

"Upon trust (as to the first twenty-one thousand pounds thereof to pay the sum of seven thousand pounds to my son Richard Francis Cooper the sum of seven thousand pounds to my son John Hartshorn Cooper and to apply the remaining seven thousand pounds in the repayment of the mortgage for that amount upon my Culland Hall estate and as to the residue (if any) thereof upon trust as to one-half part or share for my said son Richard Francis Cooper absolutely and as to one fourth part or share for my said son John Hartshorn Cooper absolutely and as to the remaining one-fourth part or share for my daughter Barbara Violet Cooper but so that such last mentioned one-fourth part or share shall be retained by my trustees upon the like trusts and subject to and with the like powers and provisions as are declared in clause 15 of my said will concerning the five thousand pounds trust legacy bequeathed to my said daughter."

3. I declare that if my residuary estate without the value of my said oil rights is not equal to twenty-one thousand pounds my trustees shall until the realization of my oil rights or sufficient of them to produce with the rest of my residuary estate the said sum of twenty-one thousand pounds mentioned in clause 2 hereof or the expiration of twenty-one years after my death whichever shall be the shorter period

pay out of the annual income from my residuary estate to each of my said sons during his life the sum of three hundred and fifty pounds less income tax or if such income is insufficient to pay such sums divide the same equally between my said sons and accumulate the balance in any year in which the income shall be more than sufficient for the payment of the said sum of three hundred and fifty pounds and such accumulations shall be considered as capital monies and held upon the trusts declared concerning my residuary estate.

4. I declare that if after the payment of the said sum of twenty-one thousand pounds all my oil rights have not been realized my trustees shall value my daughters one-fourth share of such oil rights and shall pay to her out of
34 the monies received each year from such oil rights a sum equal to ten per cent free of income tax on such value and accumulate the balance (if any) and such accumulations shall be considered as capital monies and held upon the trusts declared concerning her said trust legacy of five thousand pounds.

5. In all other respects I confirm my said will.

In Witness whereof I have hereunto subscribed my name this twelfth day of November one thousand nine hundred and eighteen—Arthur Francis Thomas Cooper—Signed by the said Arthur Francis Thomas Cooper as and for a first codicil to his last will and testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses—F. B. Hulke—Admiralty House Deal Surgeon—M A Tucker Evans 22 Langham Street London Nursing Sister.

Exhibit B.

Copy

This Memorandum of Agreement made the ninth
35 day of October, 1917, between Frank Cooper and Frank O. Harrison, as Trustee for the use of said Frank Cooper, parties of the first part, and The Ohio Oil Company, a corporation, formed under the laws of Ohio, of Casper, Wyoming, party of the second part, Witnesseth:

1. The first parties have granted to the second party the exclusive privilege to prospect and explore for oil and gas and to develop and produce oil and gas on the following described lands of the parties of the first part, to-wit:

All of Sections One (1), Two (2), Three (3), Eleven (11), Thirteen (13), Fifteen (15), Twenty-three (23), and the West Half of the West Half (W½W½) of Section Twelve (12), and the West Half of the Northwest Quarter (W½NW¼), the Southeast Quarter of the Northwest Quarter (SE¼NW¼), and the Northwest Quarter of the Southwest Quarter (NW¼SW¼) of Section Fourteen (14), all in Township Nineteen (19) North of Range Seventy-eight (78) West, and the North Half (N½), the West Half of the Southeast Quarter (W½SE¼), and the Southwest Quarter (SW¼) of Section Twenty-seven (27), and the South Half (S½) of Section Thirty-five (35), all in Township Twenty (20) North of Range Seventy-eight (78) West of the Sixth Principal Meridian, all situated in Carbon County, Wyoming.

The second party may employ all lawful and usual means to discover, develop and produce oil and gas upon said lands, and shall forthwith enter upon such undertaking and prospect, drill, explore for, develop and produce the same with all usual and reasonable diligence continuously during the continuance of this agreement.

It is understood between the parties that the parties of the first part herein have heretofore conveyed away all their right, title and interest in said lands "excepting and reserving however unto the said Frank Cooper, and unto the said Frank O. Harrison, as Trustee, for the use of said Cooper, and to their heirs, successors and assigns all oil and all gas underlying the said lands or any of them with the perpetual right to explore for, develop, extract and take away the same".

It is especially agreed that the second party shall in all things keep within the rights so excepted and reserved, and shall not interfere with the rights of the prior grantees of said Cooper and Harrison.

2. This agreement, unless sooner terminated for cause, shall continue for the period of twenty (20) years from the date hereof. In the event that oil or gas in paying quantities is being produced at the expiration of the 20-year period

aforesaid, the second party shall be entitled to an extension of said period for a further term of twenty years, upon like conditions, but the royalty payments during such extended period shall be at the rate of twenty per cent (20%).

3. The second party will pay to the first parties the sum of one hundred dollars ($100.00) as a minimum rental for each full section of said lands or the equivalent of a full section for each year during the continuance of this agreement. Each of said payments shall be applied on the percentage, if any, to be paid within the year to the first parties as herein provided.

4. In the event that the production of oil and gas in any year shall not be sufficient to compensate the minimum payment for such year, then such payment shall be taken to be rental for the said premises for such time as the same shall have been occupied within such year.

5. At all times during the continuance of the privilege hereby granted the second party shall prosecute the
36 work of discovery, development and production of oil and gas with diligence suitable to the undertaking and adequate to realize the full benefit of the natural resources of said lands, practicing the best and most approved appliances employed in the same or similar fields for such purposes, and using due care to see that the oil and gas within said lands shall be produced from wells within the limits thereof and not drained away through wells on neighboring lands. It is the intent of this agreement that the second party shall develop and produce oil and gas from all the various oil or gas bearing strata in said lands of whatsoever depth within practicable limits. No waste shall be permitted. Loss by fire, explosion or other casualty shall be carefully guarded against. Adequate facilities for storage and transportation shall be provided. If devices for the conversion of gas into oil shall be employed or shall be practicable in the same or similar fields, such appliance shall be put in use on said premises, all by the second party. The second party shall drill at least one well at a convenient and promising location to be selected by it near the dividing line between said Sections 2 and 35, to a sufficient depth to reach the supposed oil bearing sands in that region corresponding to the so-called Frontier sand in the Lost Soldier field or

the Wall Creek sand in the Salt Creek field in Wyoming, not exceeding, however, a depth of three thousand feet (3,000). The drilling of such well shall be commenced within sixty (60) days after acceptance by the first parties of this agreement, and drilling shall be prosecuted with all reasonable diligence continuously thereafter and the drilling of such well shall be completed within six months from the time of commencement. During the second six months not less than one additional well shall be drilled by the second party as above specified; during each subsequent six months not less than two additional wells. On default in these requirements the first party may terminate this agreement, offsetting wells shall be drilled by second party against each foreign well within three hundred (300) feet of the boundary line.

6. The second party shall keep full and accurate logs of all drillings; full and complete accounts and records of all discoveries, production and disposition of oil and gas, and accurate accounts of all expenditures in the aforesaid undertakings. At all times free access shall be given to the first parties or their representatives to the premises and to the logs, accounts and records in any way relating to the same. As soon as practicable after the close of each month the second party will make full and accurate reports to the first parties as may be required touching all matters in any way connected with this agreement; and like special reports shall be made whenever requested. All such reports shall be verified by some responsible agent of the second party having actual knowledge of the facts.

7. The second party shall deliver to the first parties as produced during the first year twelve and a half per cent (12½%); during the second year thirteen per cent (13%); during the third year thirteen and a half per cent (13½%) and so on, increasing each year one-half of one per cent of all oil or gas produced from the said premises, for first ten years, after which the royalty interest shall be twenty per cent (20%) during the remainder of this lease or any extension thereof, the same being delivered free of cost in storage tank or pipe line connected with the wells on said premises; or at the option of the first parties such deliveries may at any time or from time to time be commuted into cash at the market price for crude oil at the wells then prevailing in the field where the premises are situated.

8. The privilege hereby granted to the second party shall not include the exclusive right of possession or use of the surface or other portions of said lands, but only such as are necessary for the prosecution of the undertakings aforesaid. The second party shall at all times so conduct his operations as to interfere as little as practicable with the full use and enjoyment of the surface of said lands and other portions thereof not required for the purposes of this agree-
37 ment. Whenever requested by the first parties, the second party shall bury all oil, gas and water lines. At the termination of this agreement the second party will remove all refuse and obstructions of every kind from said premises, and restore said premises as nearly as practicable to their original conditions. No casings, however, shall be removed from any producing well, nor from any wells of water suitable for use which may be developed upon said premises, except such second or outer casing as may be removed without impairing the efficiency of the well.

9. No cessation of operations nor any delays in operation by the second party shall be excused unless the same shall be immediately reported to the first parties. All such notices shall be given to the agent of the first parties, and in each case of cessation or delays shall be accompanied with a full and particular statement of the causes and circumstances deemed to justify or excuse the same.

10. No assignment of this agreement, or any part thereof, nor any grant or transfer of rights arising under the same, may be made by the second party unless in writing, and with the written consent and approval of the first parties.

11. This agreement is made subject to all existing easements or rights of way in said lands, and subject to the laws of Wyoming authorizing future grants of easement or rights of way. The second party shall observe the laws of Wyoming and conform to the same in all his operations under this agreement.

12. In the event that the second party shall make default in the performance of the conditions of this agreement on his part, the first parties may at their option terminate the same forthwith. All notices which may be required to be given under this agreement to the second party may be ef-

fectually given by mail to the address set forth at the beginning of this agreement.

13. All controversies which may arise between the parties concerning the meaning or effect of this agreement, or the rights of the parties under the same, shall, at the request of either party, be submitted to arbitration, each party appointing an arbitrator and these two if necessary, an umpire. The award of the board of arbitrators shall be final and binding upon the parties. Either party will, on ten days' notice, appoint an arbitrator, and the arbitrators shall meet within ten days after appointment and complete the organization of the Board of Arbitration, and make their award in writing within thirty days after appointment. This provision shall not deprive the first parties of the remedy of injunction.

14. The parties of the first part will appoint an agent resident of Wyoming to whom the notices and communications required by this agreement to be made by the second party shall be given.

In Witness Whereof the parties of the first part have hereunto set their hands and seals, and the party of the second part has caused these presents to be executed by its President and Secretary, the day and year first above written.

That the foregoing stipulation of facts was all of
38 the evidence given or offered on the trial of said cause.

Whereupon the plaintiffs moved for judgment in favor of the plaintiffs on the pleadings and proofs, which said motion was and is in words and figures as follows, to-wit:

Motion of Plaintiffs for Judgment on Pleadings and Proofs.

The plaintiffs upon the submission of the above-entitled cause to the Court moves the Court upon the pleadings and the evidence for judgment in favor of the plaintiffs and against the defendant for the amounts claimed in the petition with interest and costs.

Dated January 7, 1932.

CORTHELL, McCOLLOUGH & CORTHELL,
Attorneys for Plaintiff.

Whereupon defendant moved for judgment in favor of defendant, which said motion was and is in words and figures as follows, to-wit:

Motion for Judgment in Favor of Defendant.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the defendant above named, at the conclusion of all of the evidence introduced upon behalf of plaintiff and defendant, and moves the Court for judgment in favor of the said defendant and against the plaintiffs, dismissing plaintiffs' petition with costs to said defendant.

Dated this 7th day of January, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

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39 The Court then made and entered an order taking said case under advisement and allowing plaintiffs ten days for filing brief and allowing defendant ten days thereafter for filing defendant's brief and allowing plaintiffs five days thereafter for filing plaintiffs' reply brief, which said order was and is in words and figures as follows, to-wit:

Trial to Court and Case Taken Under Advisement.

At this day come the plaintiffs by N. E. Corthell, Esquire, their attorney, and the defendant, by John R. Wheeler, Esquire, Special Attorney for the United States Bureau of Internal Revenue, and Albert D. Walton, Esquire, United States Attorney for the District of Wyoming, also comes. And this case comes on now to be tried to the Court without a jury, pursuant to a written stipulation thereto heretofore filed herein.

Thereupon it is announced by counsel in open court that all evidence in this case will be in the form of written stipulation of facts herein filed.

Thereupon counsel for plaintiffs announces he desires to file motion for judgment for plaintiffs and permission therefor is granted by the Court, and thereupon plaintiffs file motion for judgment herein. Also, counsel for defendant state that they desire to file motion for judgment for defendant and, permission being granted by the Court, the defendant thereupon files motion for judgment herein.

This case is thereupon argued to the Court by the attorneys for the parties hereto and is by the Court taken under advisement.

It is ordered by the Court that plaintiffs be, and they are hereby, allowed ten days from and after this date within which to file and serve their brief; defendant is allowed ten days thereafter within which to file and serve his brief, and plaintiffs are allowed five days thereafter within which to file and serve reply brief.

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40 Be it further remembered that on the 7th day of April, A. D. 1932, the Court handed down a Judge's Memorandum holding and deciding as follows, to-wit: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be submitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases."

Be it further remembered that on the 7th day of April, A. D. 1932, an order was duly entered granting counsel thirty days from April 7, 1932, within which to submit judgment to the Court for approval, which said order was and is in words and figures as follows:

Order Allowing Time to Submit Judgment.

The Court having this day filed in Case No. 2062 Civil, Richard F. Cooper, Plaintiff, vs. Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, a memorandum opinion which also covers the trial of this case, it is now ordered by the Court that thirty days from and after this date be, and the same are hereby, allowed

within which the attorneys for the parties hereto may collaborate and submit form of judgment to be entered in this case.

Be it further remembered that on the 7th day of May, A. D. 1932, an order was duly entered enlarging the time to and including May 14, 1932, for counsel to prepare and submit judgment for the Court's approval, which said order was and is in words and figures as follows, to-wit:

Order Enlarging Time to Prepare and Enter Judgment.

The above-entitled matter coming on to be heard this day upon motion made in open court by Albert D. Walton, United States Attorney for the District of Wyoming, attorney for the defendant, for an order enlarging the time heretofore granted within which to prepare and enter judgment herein, and good cause being shown therefor:

It is hereby ordered that the time within which the
41 judgment in the above-entitled cause may be prepared and entered herein be, and the same is hereby, enlarged to and including the 14th day of May, A. D. 1932.

Dated this 7th day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that thereafter and on the 13th day of May, A. D. 1932, a judgment was entered in favor of the plaintiffs and against the defendant, which said judgment was and is in words and figures as follows, to-wit:

Judgment.

This cause having heretofore come on to be heard
42 before the Court without the intervention of a jury, the parties having waived in writing the privilege of having the case tried before a jury, and the plaintiffs having appeared by N. E. Corthell, their attorney, and the defendant having appeared by John R. Wheeler, Special Counsel, Bureau of Internal Revenue, Albert D. Walton, United States Attorney for the District of Wyoming, and Ewing T. Kerr, Assistant U. S. Attorney for the District of Wyoming, his attorneys; and the Court having taken the case under advise-

ment, and having considered the stipulation of facts and the other evidence, and the admissions made in open court, and having heard the argument of counsel, and being now fully advised:

The Court finds generally for the plaintiffs, Richard F. Cooper and Barbara V. Cooper, and against the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, upon the cause of action set forth in the petition for the sum of Five Hundred Thirty and 75/100 Dollars ($530.75) with interest at the rate of 6% per annum from December 29, 1928.

It is therefore considered and adjudged by the Court that the plaintiffs, Richard F. Cooper and Barbara V. Cooper, do have and recover from the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, the said sum of Five Hundred Thirty and 75/100 Dollars ($530.75), together with interest at the rate of 6% per annum from December 29, 1928, together with the costs of this action to be taxed.

To which finding and judgment the defendant excepted at the time; and the defendant is hereby allowed sixty days within which to file his bill of exceptions in the premises.

It is certified by the Court that there was probable cause for the acts done by the defendant as Collector of Internal Revenue in that he acted under the direction of the Commissioner of Internal Revenue in the matter of the collection of the income taxes for the recovery of which this action was brought.

43

Done in open court this 13 day of May, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 9th day of July, A. D. 1932, a motion was filed on behalf of the defendant for an extension of time within which to prepare and file his bill of exceptions and submit the same to the Court for approval, which said motion supported by affidavit of Albert D. Walton, of counsel for defendant, was and is in words and figures as follows, to-wit:

Motion for Further Extension of Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

Comes now the defendant above named by Albert D. Walton, United States Attorney for the District of Wyoming, and moves the Court for an order further enlarging the time within which defendant may prepare and file bill of exceptions and present same to the Court for allowance to and including the 10th day of September, A. D. 1932.

This motion is based upon the affidavit of Albert D. Walton hereto attached and made a part hereof.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,

Attorney for Defendant.

Affidavit.

United States of America, District of Wyoming, State of Wyoming, County of Laramie—ss.

Albert D. Walton, being first duly sworn according to
44 law, upon his oath deposes and says: that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is the attorney for the defendant in the above entitled cause; that a judgment was entered against the defendant in the above entitled cause on the 13th day of May, A. D. 1932, and that in and by said judgment as entered the defendant was given sixty days from and after date of entry within which to prepare and file a bill of exceptions and present the same to the Court for allowance; that immediately upon the entering of said judgment affiant notified the Attorney General of the United States that judgment had been entered against the defendant in said cause, and sent a copy of said judgment to the said Attorney General, and requested advice as to whether appeal would be taken; that up to the date hereof, to-wit, July 9, 1932, the Attorney General has not advised affiant as to whether an appeal is to be taken in said cause; that owing to the fact that affiant has been busily engaged in the work connected with the office of the United States Attorney for the District of Wyoming since May 13, 1932, he has

not had the opportunity to prepare said bill of exceptions, and owing to the business of said office now pending before said Court for disposition, affiant will be unable to prepare said bill of exceptions within the time allowed by the provisions of said judgment, but will be able to prepare, file, and present to the Court for allowance said bill of exceptions on or before September 10, 1932.

ALBERT D. WALTON.

Subscribed and sworn to before me this 9th day of July, A. D. 1932. (Seal) Clara H. Ahrens, Notary Public. My Commission expires February 5, 1934.

Be it further remembered that on the 9th day of July, A. D. 1932, an order was duly entered by the Court extending the time for defendant to prepare and file his bill of exceptions herein and present the same to the Court for approval, which said order was and is in words and figures as follows, to-wit:

Order Further Extending Time Within Which to Prepare and File Bill of Exceptions and Present Same to Court for Allowance.

The above entitled matter coming on to be heard
45 this day upon the motion of the defendant praying for an order further extending the time within which defendant may prepare and file his bill of exceptions herein and present same to the Court for allowance, and good cause being shown therefor:

It is hereby ordered that the time within which the defendant may prepare and file his bill of exceptions herein and present the same to the Court for allowance be, and the same hereby is enlarged and extended to and including the 10th day of September, A. D. 1932.

Dated this 9th day of July, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Be it further remembered that on the 1st day of September, A. D. 1932, a motion was made and filed by the defendant in the above entitled cause praying that an order nunc pro tunc be entered overruling defendant's motion for judgment and

sustaining plaintiffs' motion for judgment, in accordance with the Judge's Memorandum handed down on the 7th day of April, A. D. 1932, which said motion was and is in words and figures as follows, to-wit:

Motion for Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiffs' Motion for Judgment.

Comes now Marshall S. Reynolds, Individually and as Collector of Internal Revenue, and moves the Court that an order nunc pro tunc be entered herein overruling defendant's motion for judgment made and filed on the 7th day of January, A. D. 1932, and sustaining plaintiffs' motion for
46 judgment made and filed on the 7th day of January, A. D. 1932, effective as of date May 13, A. D. 1932, in accordance with the Judge's Memorandum handed down and dated on the 7th day of April, A. D. 1932, for the reason and upon the ground that through inadvertence such an order has not been entered, nor did the judgment entered herein include the ruling upon said motions.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,

Attorney for Defendant.

Be it further remembered that on the 1st day of September, A. D. 1932, an order nunc pro tunc overruling the defendant's motion for judgment and sustaining plaintiffs' motion for judgment was duly entered herein, which said order nunc pro tunc was and is in words and figures as follows, to-wit:

Order Nunc Pro Tunc Overruling Defendant's Motion for Judgment and Sustaining Plaintiffs' Motion for Judgment.

The above entitled matter coming on to be heard this day upon the motion of the defendant above named praying that an order nunc pro tunc be entered overruling the defendant's motion for judgment and sustaining plaintiffs' motion for judgment, pursuant to the Judge's Memorandum handed down herein on the 7th day of April, A. D. 1932, and it appearing to the Court that in the said

Judge's Memorandum the Court held and decided: "Upon the submission of the cases, each of the parties filed motions for judgments in his favor. The motions of the plaintiffs for the reasons hereinabove stated, will be sustained, and the motions of the defendant will be overruled, reserving to him proper exceptions. Judgments may be sub-
47 mitted in favor of the plaintiffs through collaboration of counsel within thirty days from the date hereof in each of the cases.".

And it further appearing to the Court that a judgment was entered in the above entitled case on the 13th day of May, A. D. 1932, in favor of the plaintiffs and against the defendant, but through inadvertence the said judgment did not contain a provision sustaining plaintiffs' motion for judgment and overruling the defendant's motion for judgment:

It is, therefore, ordered that the motion of the plaintiffs for judgment herein filed on the 7th day of January, A. D. 1932, be, and the same hereby is, sustained, to which said ruling the defendant duly excepts, and that the motion of the defendant for judgment in favor of the defendant filed on the 7th day of January, A. D. 1932, be, and the same hereby is, overruled and denied, to which said ruling the defendant duly excepts.

It is further ordered that this order be, and the same hereby is, effective from and after the 13th day of May, A. D. 1932, the date upon which judgment was entered in the above entitled cause.

Dated this 1st day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

It is hereby stipulated and agreed by and between
48 the parties hereto that the above and foregoing which is tendered by the defendant, Marshall S. Reynolds, Individually and as Collector of Internal Revenue, as his bill of exceptions in the above-entitled cause, contains a full, true and correct statement of the evidence introduced in said cause, and a full, true, and correct statement of all of the proceedings in the trial and disposition of said cause, and the exceptions of the defendant had and taken in such pro-

ceedings, and that said tendered bill of exceptions may be approved, allowed, settled, and sealed as the bill of exceptions in this cause.

Dated this second day of September, A. D. 1932.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant.

Order of Court Approving and Settling Bill of Exceptions.

Filed Sept. 2, 1932.

On this 2 day of September, A. D. 1932, and within
49 the time allowed by the order of this Court heretofore duly made and entered, the defendant Marshall S. Reynolds, Individually and as Collector of Internal Revenue, tendered his bill of exceptions herein, together with a stipulation of counsel that the same might be approved, allowed and settled as the bill of exceptions in this cause:

And the Court, having duly considered and examined said bill of exceptions, and it being found that the exceptions are therein truly alleged, the same is by the Court hereby allowed, settled and approved and said bill of exceptions is hereby signed and sealed by the Honorable T. Blake Kennedy, the Judge of said Court before whom said proceedings were had, and the same is ordered by the said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge before whom said proceedings were had this 2 day of September, A. D. 1932.

T. BLAKE KENNEDY, Judge.

Election as to Printing Transcript.

Filed Sept. 13, 1932.

Comes now the above named defendant and appellant
50 and hereby elects to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 12th day of September, A. D. 1932.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue,

Attorneys for Defendant-Appellant.

Stipulation for Transcript.

Filed Sept. 13, 1932.

It is hereby stipulated and agreed by and between
51 the parties to the above entitled cause that the following portion of the record shall be included in the transcript, to-wit:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of Errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

This stipulation.

Praecipe for transcript.

Clerk's certificate.

52 It is further stipulated that the above is without prejudice to either party to have any other portions of the record certified up if it should be necessary.

N. E. CORTHELL,
Attorney for Plaintiff.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,

EWING T. KERR,
Assistant United States Attorney for the District of Wyoming,

JOHN R. WHEELER,
Special Attorney, Bureau of Internal Revenue.

Attorneys for Defendant.

Praecipe for Transcript.

Filed Sept. 13, 1932.

To the Clerk of said Court:

You are hereby requested and directed to prepare
53 and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

Plaintiff's petition, filed January 15, 1931.

Defendant's answer, filed March 30, 1931.

Stipulation waiving trial by jury, filed May 11, 1931.

Judge's Memorandum, filed April 7, 1932.

Judgment, filed May 13, 1932.

Petition for appeal, filed August 8, 1932.

Assignment of errors, filed August 8, 1932.

Order allowing appeal, filed August 8, 1932.

Citation on appeal with acceptance of service endorsed thereon, filed August 11, 1932.

Bill of exceptions with stipulation as to approval, filed September 2, 1932.

Order of Court approving and settling bill of exceptions, filed September 2, 1932.

Election as to printing.

Stipulation as to transcript.

Praecipe for transcript.

Clerk's certificate.

ALBERT D. WALTON,
United States Attorney for the
District of Wyoming,
EWING T. KERR,
Assistant United States Attorney
for the District of Wyoming,
JOHN R. WHEELER,
Special Attorney, Bureau of
Internal Revenue,
Attorneys for Defendant-
Appellant.

[Clerk's Certificate.]

United States of America, District of Wyoming—ss.

I, Charles J. Ohnhaus, Clerk of the District Court
54 of the United States within and for the District of Wyoming, do hereby certify the above and foregoing to be a true, correct and complete transcript and copy of the record and proceedings, and of all thereof, as called for by the praecipe for transcript filed herein, including the Judge's Memorandum, in a certain cause lately in said Court pending, between Richard F. Cooper and Barbara V. Cooper, Plaintiffs, and Marshall S. Reynolds, Individually and as Collector of Internal Revenue, Defendant, as full and complete as the same still remains on file and of record in my office at Cheyenne, Wyoming.

In witness whereof, I do hereunto sign my name and affix the seal of said Court at Cheyenne, in said District, this 15th day of September, A. D. 1932.

(Seal)

CHARLES J. OHNHAUS,
Clerk, United States District Court,
District of Wyoming.

Filed Sept. 21, 1932. Albert Trego, Clerk.

Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the January term, 1933, of said court, before the Honorable John H. Cotteral, circuit judge, the Honorable George T. McDermott, circuit judge, and the Honorable Tillman D. Johnson, district judge.

Be it remembered that heretofore, to wit: On the 21st day of September 1932 a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Wyoming, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Marshall S. Reynolds, individually and as collector of internal revenue, was appellant and Richard F. Cooper and Barbara V. Cooper were appellees, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit under the supervision of its clerk, is in the words and figures following, to wit:

49 And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

Appearances

For appellant

The clerk will enter my appearance as counsel for the appellant.

ALBERT D. WALTON,
Cheyenne, Wyo.,
U.S. Attorney, Dist. of Wyoming.
EWING T. KERR,
Cheyenne, Wyo.,
Asst. U.S. Attorney, Dist. of Wyoming.
JOHN R. WHEELER,
Seattle, Wash.,
Special Attorney, Bureau of Internal Revenue.

Filed Sept. 24, 1932. Albert Trego, clerk.

The clerk will enter my appearance as counsel for the appellant.

ELDON O. HANSON,
Bureau of Internal Revenue.

Filed Jan. 9, 1933. Albert Trego, clerk.

50 For appellee

The clerk will enter my appearance as counsel for the appellees.

N. E. CORTHELL,
Laramie, Wyo.

Filed Sept. 24, 1932. Albert Trego, clerk.

Order of Submission

No. 747, No. 748, No. 749

Second day, January term, Tuesday, January 10th, A.D. 1933

Before Honorable John H. Cotteral, Circuit Judge; Honorable George T. McDermott, Circuit Judge; and Honorable Tillman D. Johnson, District Judge.

These causes came on to be heard and, by agreement of counsel, were argued together, Eldon O. Hanson, Esquire, appearing for appellant, and N. E. Corthell, Esquire, appearing for appellees.

On motion, appellant was granted leave to file twenty printed copies of a reply brief herein instanter, which was accordingly done. Appellant was also granted leave to file twenty printed copies of a supplemental reply brief within five days, appellees to file twenty printed copies of a supplemental brief in reply thereto within fifteen days thereafter.

Thereupon these causes were submitted to the court.

51 United States Circuit Court of Appeals, Tenth Circuit

No. 747, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER, APPELLEE

No. 748, January term, 1933

Appeal from the District Court of the United States from the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

BARBARA V. COOPER, APPELLEE

No. 749, January term, 1933

Appeal from the District Court of the United States for the District of Wyoming

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, appellant

v.

RICHARD F. COOPER AND BARBARA V. COOPER, APPELLEES

[April 3, 1933]

Eldon O. Hanson, special attorney, Bureau of Internal Revenue (Albert D. Walton, U.S. attorney, C. M. Charest, General Counsel Bureau of Internal Revenue, John R. Wheeler, special attorney, Bureau of Internal Revenue, and Percia E. Miller, special attorney, were with him on the brief), for appellant.

N. E. Corthell (A. W. McCullough and M. E. Corthell were with him on the brief) for appellees.

Before COTTERAL and MCDERMOTT, Circuit Judges, and JOHNSON, District Judge.

MCDERMOTT, Circuit Judge, delivered the opinion of the court.

Appellees are the beneficiaries of a trust set up by the will of their father. A part of the trust estate consists of a royalty interest

under an oil and gas lease on lands in Wyoming, the lease running from the father, the owner of the oil reserves. Appellees returned for income-tax purposes the royalties received by them during the years 1923 to 1927, both inclusive. The trustees filed an information return only; the beneficiaries claimed the deduction for depletion, in an amount conceded to be reasonable, allowed by § 214 (a) 10, Rev. Act of 1921, and the corresponding sections in the Revenue Acts of 1924 and 1926. The claim was disallowed in its entirety, the Commissioner taking the position that since the legal title stood in the name of the trustees, with directions to convert into cash at their discretion, appellees had no present or reversionary interest in the mineral estate and were therefore not entitled to any depletion allowance. The tax was paid under compulsion and protest, and this action brought to recover it. A jury was waived; the facts stipulated; the plaintiffs recovered, Judge Kennedy filing a memorandum opinion in which he took the common-sense view that the trustees were but conduits through which the income passed in its journey from the oil fields of Wyoming to the appellees. Cooper *v.* Reynolds (D.C.Wyo.) 60 F. (2d) 650.

The question presented is whether a beneficial interest in oil in place will support a claim for depletion, or whether the taxpayer must be vested with a present or reversionary interest in the legal title. It is true that the legal title vested in the trustees; it is true they were directed, at a time to be selected by them, to convert the interest into cash. But it is likewise true that, during the years in question, appellees were entitled to the undiminished income from the trust, and upon conversion in their lifetime, to share in the distribution of the proceeds. No one else has any beneficial interest in the royalties producing the taxable income; no one else has or claims any depletion allowance for the capital investment returned by way of such royalties. The question therefore is, Is depletion confined to those who hold a technical legal title?

The answer is found in the decisions of the Supreme Court of the United States, and of other courts. Depletion allowances are not dependent upon tech'ical questions of title; they rest upon a broader base. If the taxpayer has an economic interest which is adversely affected by the production of oil, he may deduct depletion from the income received from that oil. Lynch *v.* Alworth-Stephens Co., 267 U.S. 364; Weiss *v.* Weiner, 279 U.S. 333; Palmer *v.* Bender, 287 U.S. 551. In the latter case, the taxpayer had assigned his lease, reserving only an over-riding royalty. In the cases at bar, appellees were entitled not only to the royalty, but to share in the proceeds of a sale if made in their lifetime. Equitable estates are not barred by either the statute or decisions. Commissioner *v.* Molter (C.C.A 10) 60 F. (2d) 498; Merle-Smith *v.* Commissioner (C.C.A 2) 42 F. (2d) 837, certiorari denied, 282 U.S. 897. In the latter case, the equitable interest was subject to extinction, but the taxpayer was held entitled to depletion while the interest lasted. To the same effect, see Kuhn *v.*

Commissioner, 24 B.T.A. 216; Alphin *v.* Commissioner, 21 B.T.A. 1101.

The decision of the Supreme Court of the United States in Anderson *v.* Wilson, — U.S. — (decided March 13, 1933), is cited by the appellant as opposed. There, as here, the legal title to the properties was in testamentary trustees; there, as here, the taxpayer was the beneficiary of the trust. The loss there was a capital loss arising from the sale of real estate by the trustees. It was held that the loss fell upon the trustees and not the beneficiary, and that the trustees were entitled to the deduction in their income-tax return.

There is language in the Anderson case which, taken out of its setting, supports the contention of appellant. The Supreme Court, however, sees no conflict between its opinion in the Anderson case and its opinion in Palmer *v.* Bender, handed down two months earlier, for the Palmer case is not cited, much less overruled. It is neither necessary nor proper for an inferior court to suggest a conflict where the Supreme Court has suggested none, nor, having suggested it, undertake to demonstrate its nonexistence. It may not be impertinent, however, in reply to appellant, to note that there is no irreconcilable inconsistency between the two decisions. One dealt with capital losses, and held that the loss follows the title; the other dealt with depletion of minerals by the production which gave rise to the income, and held that questions of title were not controlling. In one the trust was a taxpayer, entitled to claim the capital loss; in the other the trust made no return except for the information of the Commissioner.

It will be enough for us to decide which of the two cases controls the cases at bar. Fortunately that decision is not a difficult one. The Palmer case deals with the identical statute with which we are confronted. It deals with the depletion of oil reserves, as do our cases. In the Palmer case the taxpayer had no title either to the lease or the real estate; all he had was a contractual right to receive a part of the oil produced under a lease owned by another, from real estate owned by a third. In our cases the taxpayers have a testamentary right to receive a part of the oil produced under a lease owned by others—the trustees—plus a right to share in the proceeds of the royalty when and if sold. The legal questions presented are identical, except insofar as the appellees' case here is strengthened by their reversionary right. In the Palmer case the court declined to consider refinements of title. The court said:

"It has been elaborately argued at the bar and in the briefs whether under Louisiana law the two instruments are assignments or subleases. We do not think the distinction material. Nothing in § 214 (a) (10) indicates that its application is to be controlled or varied by any particular characterization by local law of the interests to which it is to be applied. * * * The formal attributes of those instruments or the descriptive terminology which may be applied to them in the local law are both irrelevant."

The court then considered whether the depletion statute was confined to any form of legal ownership, and gave its answer in these words:

"The allowance to the taxpayer is not restricted by the words of the statute to cases of any particular class or to any special form of legal interest in the oil well. * * * The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired by investment any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital. That the allowance for depletion is not made dependent upon the particular legal form of the taxpayer's interest in the property to be depleted was recognized by this court in Lynch *v.* Alworth-Stephens Co., 267 U.S. 364. * * * Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough, if by virtue of the leasing transaction he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. * * * Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships, and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case."

This considered language, dealing with the particular statute here involved, is broad and unmistakable. The decision itself allowed depletion to one who had much less economic interest in the oil reserves than the appellees here. In the cases at bar, unlike the Anderson case, it is not a question of which taxpayer gets the allowance; in our cases, the depletion actually suffered by the royalty interest must be allowed to appellees or no allowance therefor made. We cannot ignore the Palmer case because of a supposed conflict between it and a later case dealing with another statute.

The Palmer case and its progenitors do no more than apply, to a new situation, the accepted philosophy that taxation is an intensely practical matter, and questions must be determined according to the truth and substance of the transaction, and not by the form it took. Eisner *v.* Macomber, 252 U.S. 189; United States *v.* Phellis,

257 U.S. 156; Bowers *v.* Kerbaugh Emp. Co., 271 U.S. 170. The law recognizes equitable estates for the purpose of paying income taxes, Irwin *v.* Gavit, 268 U.S. 161; Anderson *v.* Wilson, supra; likewise it should and does recognize them for proper deductions from that income. The allowance claimed here was essentially just, for every barrel of oil produced lessened the eventual sale price of the property in which appellees may share; such production in fact depleted the reservoir of oil in which appellees had a substantial economic interest.

There is a subsidiary point, of minor importance, in No. 748. John Hartshorn Cooper, a brother of Barbara V. Cooper and one of the beneficiaries of the trust created by their father's will, died in 1921. Barbara inherited part of her brother's interest in the royalties in question. His estate was closed on September 13, 1923. The estate was, therefore, the taxpayer until September 13, 1923. and Barbara was the taxpayer after that date. Bankers' Trust Co. *v.* Bowers, (C.C.A. 2) 295 F. 89; Hoeper *v.* Tax Commission, 284 U.S. 206. The Commissioner apportioned the 1923 income between the two taxpayers according to the number of days included in each of the periods in question. The propriety of such method of apportionment if the Commissioner is unable to determine the actual income received by each of the taxpayers, is not questioned. On the other hand, the Commissioner should assess the income actually received by each of the taxpayers if it can be ascertained. Rules of thumb should only be resorted to in case of necessity, for the actual is always preferable to the theoretical. Doyle *v.* Mitchell Brothers Co., 247 U.S. 179, 187; Howbert *v.* Penrose (C.C.A. 10) 38 F. (2d) 577.

The point in disagreement is whether the record discloses that the Commissioner erred in resorting to an apportionment—that is, was the actual income of each taxpayer readily ascertainable? The record is not entirely satisfactory on the point but the petition alleges that the Commissioner added to appellee's taxes for the year 1923, the difference between the income actually received by her, and the amount which would have been received by her if the income for the entire year had been prorated according to the calendar. This allegation is expressly admitted by the answer. The stipulation of facts recites that for the year 1923 the Commissioner's determination rested in part upon the "difference between the actual gross receipts as returned by the plaintiff, and the gross receipts as determined by the Commissioner by apportionment." In addition to the pleadings and the stipulation of facts, it is a matter of common knowledge that a record is kept of oil runs, both by the producing companies and by the pipe line purchasers as the oil is marketed. From these records, a close approximation can be had as to the amount of production in any period of time. Furthermore, in all human probability, the trustees of this estate kept an accurate record of disbursements made by them to the estate of John

Hartshorn Cooper, as well as an accurate record of the disbursements made to Barbara V. Cooper. We therefore conclude that there is substantial evidence in the record to support the finding of the trial court on this question of fact.

Appellant filed a supplemental reply brief upon the question of interest, the contention being that because of section 319 of the Economy Act of June 30, 1932, the interest on this judgment should be reduced from 6 percent to 4 percent, at least after the effective date of the Economy Act. Huwe *v.* Ohmer Fare Register Company (C.C.A. 6) 61 F. (2d) 721; Caraleigh Phosphate & Fertilizer Works *v.* United States (Ct.Cl.) 1 F. Supp. 854. The point passes out of the case by virtue of section 2 of the First Deficiency Act of January 30, 1933. Title 2, § 2 of that act provides that "section 319 of the act of June 30, 1932, shall not apply to any judgment rendered against the United States prior to July 1, 1932."

The judgments are affirmed.

52 *Judgment*

Thirty-seventh day, January term, Monday, April 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, circuit judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Motion to Stay Mandate

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for a period of thirty (30) days, pending an application to the Supreme Court of the United States for a writ of certiorari.

Dated this 2nd day of May, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
53 EWING TO KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue.
Attorneys for Appellant.

Filed May 3, 1933. Albert Trego, clerk.

Order

Thursday, May 4th, A.D. 1933

Before Honorable Robert E. Lewis, senior circuit judge, at Denver, Colorado, the following proceedings were had:

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, and for good cause shown, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

54 *Motion to stay mandate*

Comes now Marshall S. Reynolds, individually and as collector of internal revenue, appellant in the above-entitled cause, and moves the court for an order staying the mandate to be issued in the above-entitled cause on the judgment rendered herein on the 3rd day of April, A.D. 1933, for an additional period of thirty days, pending an application to the Supreme Court of the United States for a writ of certiorari. This motion is based upon the affidavit of Albert D. Walton, which is hereto attached and made a part hereof.

Dated this 2nd day of June, A.D. 1933.

ALBERT D. WALTON,
United States Attorney for the District of Wyoming,
EWING T. KERR,
Asst. United States Attorney for the District of Wyoming,
ELDON O. HANSON,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Appellant.

Filed June 3, 1933. Albert Trego, clerk.

55 *Order*

No. 747. No. 748, No. 749

Twentieth Day, April term, Saturday, June 3rd, A.D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, circuit judges.

These causes came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day; and that if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supeme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

56 *Clerk's Certificate*

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Wyoming, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries and proceedings, including the opinion (except full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein Marshal S. Reynolds, individually and as collector of internal revenue, was appellant, and Richard F. Cooper and Barbara V. Cooper were appellees, No. 749, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the city of Denver, Colorado, this 20th day of June, A.D. 1933.

[SEAL]

ALBERT TREGO,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is assigned for argument immediately following no. 225.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.